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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 269

DAVID R. PULLIAM, **Petitioner,**

v.

COMMISSIONER OF INTERNAL REVENUE, **Respondent.**

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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COMMISSIONER OF INTERNAL REVENUE, **Respondent.**

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DAVID R. PULLIAM, Petitioner, prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Tax Court is reported in 39 T.C. 883, and appears in the Printed Record, p. 7. The opinion of the Court of Appeals, Appendix A, *infra*, is reported in 329 F.2d 97.

JURISDICTION

The judgment of the Court of Appeals was entered on March 16, 1964. Petition for Rehearing was timely filed. Rehearing was denied April 15, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Tax Court and the Court of Appeals misconstrued and misapplied the decision of the United States Supreme Court in *Davis v. United States*, 370 U.S. 65 (1962), and substituted an absolute presumption of fair market value for the rebuttable presumption prescribed by the Supreme Court; — the Court of Appeals holding that the *Davis* case compelled its determination that the tax was incurred even though there was no agreement between husband and wife on which a presumption of fair market value of the wife's *unassignable* inchoate rights could be based.

2. Whether in a divorce case a contested award of husband's property to the wife — without any agreement of the parties and without any release by the wife — resulted in a capital gain to taxpayer husband measured by the difference between his basis and the appreciated value of the property awarded to his wife.

3. Whether a *non-assignable* chose in action — a wife's claim for marital rights — has, absent an agreement, a "fair *market* value" required by the statute to justify the capital gains tax imposed on the husband.

4. Whether, absent an agreement of exchange, the

wife's non-assignable inchoate rights can be *presumed* to have a fair *market* value equal to the value of the property taken by the Court from the husband and delivered to the wife.

STATUTES INVOLVED

Internal Revenue Code of 1954, §1001(a), (b), 26 U.S.C. §1001, 68A Stat. 295.

> Sec. 1001. *Determination of Amount of and Recognition of Gain or Loss.*
>
> (a) Computation of Gain or Loss. — *The gain from the sale or other disposition of property shall be the excess of the amount realized* therefrom over the adjusted basis provided in section 1011 for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized. (Emphasis supplied.)
>
> (b) Amount realized. — The amount realized from the sale or other disposition of property shall be *the sum of any money received plus the fair market value of the property (other than money) received.* * * * (Emphasis supplied.)
>
> (c) * * *
>
> (d) * * *

It was under the above sections of the statute that the tax was determined here.

STATEMENT OF THE CASE

Petitioner and his wife were married in 1925 and divorced in Colorado in 1956 (R. 8). There was no prayer for alimony in the case (R. 2-3), but in the final decree of divorce certain real property was "transferred to the plaintiff, B. O'Nan Pulliam [the petitioner's wife] by this decree." (R. 4). There was no property settlement agreement entered into by the petitioner and his wife (R. 5-6, 8). They had attempted to reach such an agreement but were unable to do so, and it was contested throughout (R. 5-6). The wife did not sign any release of alimony or of support (R. 5). The order and decree of the Court declared it was to "act as and be a conveyance" of the record title to the property described in the decree from taxpayer to his wife (R. 4-5). There was no money judgment (R. 4-5). The Commissioner held that the taxpayer realized a long-term capital gain of $53,051.52, measured by the appreciation in value of the property taken from him and determined a deficiency in income tax resulting therefrom (R. 9). The Tax Court, relying on the Supreme Court case of *Davis v. Commissioner*, 370 U.S. 65 (1962), upheld the Commissioner's determination (R. 9), and the Court of Appeals sustained the Tax Court. The Court of Appeals said (329 F.2d at p. 98, App. A, *infra*, at 16):

> "The right of dower does not exist in Colorado, and a husband who has title to the property may convey it without the consent of the wife. *It appears that the only inchoate right of any consequence the wife has in Colorado is, if she survives her husband, she may reject provisions he makes for her in his will and take instead one-half of his estate.* In this instance the wife performed the usual duties of a house-

wife, and performed no other tasks to specifically assist in the accumulation of property, and brought no property into the marriage." (Emphasis supplied.)

It held that the wife's inchoate marital rights in effect were extinguished by the decree and would under the *Davis* case be presumed to have a fair market value equal to the value of the property taken from the husband, and that he would be presumed to have benefited to that amount.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals is of great importance in the administration of the tax laws because, by misconstruing the opinion of the Supreme Court in the *Davis* case and substituting an absolute presumption of fair market value for the Supreme Court's rebuttable presumption, it in effect amends the statute and strikes therefrom the provision that the amount realized on a disposition of properties shall be the sum of money received "*plus the fair market value of the property other than money received.*"

I.

The term "fair market value" has become of fundamental importance in the tax law. Over and over again it has been defined by the Internal Revenue Service and by the Courts as "the fair value of the property in money as between one who wishes to purchase and one who wishes to sell * * *. Market value is the price at which a seller willing to sell at a fair price and a buyer willing to buy at a fair price, both having reasonable knowledge of the facts, will trade." (1 Cum. Bull. 49 (1919)). Again and

again the law has been re-enacted, until this definition has in effect become a part of the law.

The Supreme Court based its decision in *Davis v. United States*, 370 U.S. 65 (1962), on the fact that the husband and wife had in that case voluntarily agreed between themselves on the exchange of the property for the wife's marital rights and that the "property received" by the husband was the release of her inchoate marital rights given by the wife. Said the Court:

> "It must be assumed, we think, that the parties acted at arm's length and that *they judged* the marital rights to be equal in value to the property for which they were exchanged. *There was no evidence to the contrary here.** Absent a readily ascertainable value, it is accepted practice *where property is exchanged* to hold as did the Court of Claims in *Philadelphia Park Amusement Company v. United States*, 126 F. Supp. 184, (1954) that the values 'of the two properties exchanged in an arm's length transaction are either equal in fact or are presumed to be equal.'" (Emphasis supplied.)

Since the best *prima facie* evidence of fair market value is an actual sale, the Supreme Court had a reasonable basis for its *rebuttable* presumption.

The Court of Appeals and the Tax Court in this case disregarded the undisputed "evidence to the contrary" and held that though there was no agreement and though there was no exchange and though the parties expressly refused to agree and the Court by *force majeur* took the

*The undisputed evidence is to the contrary in the instant case.

property of the husband and gave it to the wife, yet the presumption was absolute and that it would treat the decree of Court as though it was a voluntary agreement of the parties as to value of the wife's inchoate rights.

The *agreement* in the *Davis* case was the *sine qua non* of the Supreme Court's decision. Only the agreement satisfied the willing buyer and seller test of fair market value required by the statute and so avoided the impact of *Champlin v. Commissioner*, 71 F.2d 23 (10th Cir. 1934). By no stretch of the imagination can a decree of Court be deemed the equivalent of an agreement.

In *Harris v. Commissioner*, 340 U.S. 106 (1950), at page 110, Mr. Justice Douglas emphasizes the difference between agreement and decree:

> "In each case it is the decree that creates the rights and the duties: *and a decree is not 'a promise or agreement' in any sense — popular or statutory.*" (Emphasis supplied.)

Continuing on pages 111, 112, he says:

> "If 'the transfer' of marital rights in property is effected by the parties, it is pursuant to a 'promise or agreement' in the meaning of the statute. If 'the transfer' is effected by court decree, no 'promise or agreement' of the parties is the operating fact. *In no realistic sense is a court decree a 'promise or agreement' between the parties to a litigation.* If finer, more legalistic lines are to be drawn, Congress must do it." (Emphasis supplied.)

If there had not been an agreement between the parties in the *Davis* case, the Supreme Court would not

have simply assumed, as the Court of Appeals does, that the value of property taken by court decree without agreement of the parties proves the fair *market* value of the unassignable inchoate marital rights of the wife. Such an assumption would be wholly arbitrary. The "accepted practice" and "method" of taxation subscribed to by the Court of Appeals simply eliminates the statutory requirement of "fair market value" by presuming its existence, though the admitted facts prove the contrary.

The interpretation of the *Davis* decision adopted by the Court of Appeals results in overruling a long-established line of cases, including *Champlin v. Commissioner*, 71 F.2d 23 (10th Cir. 1934); *O'Meara v. Commissioner*, 34 F.2d 390 (10th Cir. 1929); *Commissioner v. Moore*, 48 F.2d 526 (10th Cir. 1931); and a repudiation of the doctrine of *Eisner v. Macomber*, 252 U.S. 189 (1920). As Judge McDermott, speaking for himself, Judge Phillips and Judge Bratton, said in the *Champlin* decision (71 F.2d at 29):

> "There is no difficulty about the law governing such transactions. The Sixteenth Amendment authorizes Congress to lay a tax on income. In *Eisner v. Macomber*, 252 U.S. 189, 40 S.Ct. 189, 64 L. Ed. 521, 9 A.L.R. 1570, the court defined income to include a gain or profit arising *where something of exchangeable value, severed from the capital, is received by the taxpayer for his separate use, benefit, or disposal.* Accordingly, Congress made no attempt to lay a tax upon a transaction where property was exchanged for stock unless the stock received had a market value; *that is, there must be a market where its exchangeable value could be realized.* More than that, the stock must have a 'fair' market value; that is, there must

> be a market where it may be exchanged for cash at somewhere fairly close to its actual value. * * *" (Emphasis supplied.)

The statutory requirement that what is received by the taxpayer must have a *market* value, not just value, before it becomes taxable is based on the general theory that a taxpayer should not be compelled to pay a tax unless he receives something that can be converted into cash which will enable him to pay the tax. In *Burnet v. Logan*, 283 U.S. 404 (1931), it was held that a promise to make future payments out of ore to be thereafter mined had no fair market value, although it clearly had substantial value. As the Court said, "The promise was in no proper sense equivalent to cash. It had no ascertainable fair market value." And as Judge Learned Hand said in *Bedell v. Commissioner*, 30 F.2d 622 (2d Cir. 1929), at page 624:

> "It is absurd to speak of a promise to pay a sum in the future as having a 'market value' fair or unfair. Such rights are sold, if at all, only by seeking out a purchaser and haggling with him on the basis of the particular transaction."

See also, *Humphreys v. Commissioner*, 32 B.T.A. 280 (1935) (a non-negotiable note has no fair market value); *McLaughlin v. Commissioner*, 113 F.2d 611 (7th Cir. 1940) (promise to pay in future not equivalent to cash has no fair market value) and *Commissioner v. Kahn Estate*, 174 F.2d 357 (3d Cir. 1949) (unsecured promises to pay have no fair market value).

The decision of the Court of Appeals in the instant case, if followed, will result in embarrassment and confusion in the administration of the law. The law requires,

in an exchange, a tax on the gain realized by each party to the exchange. There is nothing in the law to justify the assessment of a tax against the husband without also assessing a tax on the gain realized by the wife. It can hardly be said that her love and affection created a tax basis equivalent in value to the amount of property she receives, and that, therefore, she has not realized any gain. Only by an amendment to the law would it seem that such a result was possible.

II.

A claim for marital rights is not transferable or assignable. It would seem to be axiomatic that something which cannot be sold cannot have a fair market value. That it would be against public policy to permit the sale of claims for alimony, support or inchoate marital rights is self-evident. The test of assignability of a chose in action is set forth in 6 Am. Jur. 2d, Assignments §30, p. 214, where it is said:

> "*Test of Assignability Generally.* In the absence of any statutory provision declaring a particular chose in action to be assignable or non-assignable, the general test of assignability is whether the chose will survive. Rights which are purely personal and which die with the person cannot be assigned."

See also, 6 C.J.S. Assignments §30, p. 1079.

The law is settled in Colorado that an action for divorce, alimony and inchoate marital rights does not survive the death of either party. *McLaughlin v. Craig*, 117 Colo. 67, 71, 184 P. 2d 130 (1947); *Greer v. Greer*, 110 Colo. 92, 95, 130 P. 2d 1059 (1942); and *Hilliard v. Klein*,

124 Colo. 479, 483, 238 P. 2d 882 (1951). See also, *Tillman v. Tillman*, 172 F.2d 270 (D.C. Cir. 1948); *Bailey v. Scott*, 18 F.2d 184 (D.C. Cir. 1927); *Metropolitan Finance Company v. Wood*, 175 F.2d 209 (9th Cir. 1949).

It is equally well-settled that a wife's inchoate marital rights, which exist only as an incident to her marital status, cannot be granted or assigned but can only be extinguished by means of a voluntary release by the wife. In 28 C.J.S. Dower §65, p. 137, it is said:

> "A wife's inchoate right of dower is a mere chose in action which cannot be the subject of grant or assignment but is susceptible only of extinguishment, by means of a release:"

To the same effect, see Am. Jur. Dower, §78, p. 347.

If it should be claimed that the decision of the Colorado Court was in effect a lump award of alimony, then it is clear under Colorado law that the husband received nothing that would extinguish his wife's further claims for alimony, as under Colorado law, "Alimony is by its very nature subject to change with changing circumstances." *International Trust Company v. Liebhardt*, 111 Colo. 208, 139 P.2d 264 (1943); *Bardwell v. Commissioner*, 38 T.C. 84, *aff'd*, 318 F.2d 786 (10th Cir. 1963).

III.

A presumption cannot be sustained unless there is a reasonable connection between the fact proved and the ultimate fact presumed. In *Tot v. United States*, 319 U.S. 463 (1943), this general principle was laid down by the Supreme Court. The inference of one fact from proof of

another is arbitrary where there is no reasonable connection between the two in common experience. In accord: *Socony Vacuum Oil Co. v. Oil City Refiners*, 136 F.2d 470 (6th Cir. 1943); McCORMICK, EVIDENCE, 641 (1954). Tested by this standard, the presumption indulged by the Court in the *Davis* case is tenable on the ground that there was an actual agreement of exchange which might be held to create a presumption of fair market value. The presumption could not be sustained in the pending case, contrary to the undisputed facts that the claim of the wife for inchoate marital rights was not assignable under the laws of Colorado and could therefore have no market, and that the only possible customer who might be interested in the extinguishment of the wife's claim was the husband, who had refused to buy or agree on any price. To presume that such a right has a market in which it can be sold, in the absence of proof such as existed in the *Davis* case that there was an actual sale to the husband, is arbitrary and unreasonable. It amounts to saying that though the statute prescribes that gain cannot be recognized unless the thing received by the husband has a fair market value, the court will presume that there was such a fair market value, although the facts clearly show there was not. It is self evident that no presumption of market value of the inchoate rights can arise from the decree awarding a part of taxpayer's property to his wife.

The opinion of the Court of Appeals highlights its conviction that the Supreme Court in the *Davis* case has substituted for the statutory test of taxability a "practice" and "method" by which the statute may be disregarded and an arbitrary presumption be substituted therefor.

We submit that that interpretation is wrong and that

it is of great importance to the administration of the revenue law that it be corrected.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[March 16, 1964.]

DAVID R. PULLIAM, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Rehearing Denied April 15, 1964.

Proceeding on petition for review of decision of the Tax Court of the United States, 39 T.C. 883, which redetermined a deficiency imposed by the Commissioner of Internal Revenue. The Court of Appeals, Seth, Circuit Judge, held that where both parties to divorce asked court to make "a division", wife did not sign any release of her marital rights, and Colorado divorce decree provided that parties should retain his or her separate property which was in his or her name at time action was commenced, and also stated that decree would act as a conveyance of title from husband to wife of additional described parcel, the husband realized a long-term capital gain as result of the decree.

Affirmed.

Morrison Shafroth, Denver, Colorado (Grant, Shafroth,

Toll & McHendrie, and James H. Skinner, Jr., Denver, Colorado, were with him on the brief), for petitioner.

Gilbert E. Andrews, Jr., Washington, D.C. (Louis F. Oberdorfer, Asst. Atty. Gen., Lee A. Jackson, I. Henry Kutz, and William A. Friedlander, Attys., Dept. of Justice, Washington, D.C., were on the brief), for respondent.

Before PICKETT, LEWIS and SETH, Circuit Judges.

SETH, Circuit Judge.

The Commissioner of Internal Revenue determined there was a deficiency in petitioner's individual income tax return because there was not included in it a long-term capital gain. This gain, the Commissioner held, resulted from a transfer of property from the petitioner to his former wife as a "division of property" in a divorce decree. The Tax Court agreed with the Commissioner, and the taxpayer asked for this review.

Petitioner's wife filed a petition for divorce which contained no prayer for alimony or support, but stated:

> "That during the married life of plaintiff and defendent certain property had been acquired by the said parties; that a division of said property should be made in order that each of the parties hereto shall receive their fair and equitable portion of the same."

The petitioner in his answer in the divorce proceedings joined in the wife's prayer for a division of property. There is nothing in the record to show that petitioner later objected to this way of handling the property question in the divorce proceedings, but it does appear he did contest the details of and value used in the "division."

The Colorado court in the divorce action noted that

the parties had been married thirty years, that there were no children, and held that the petitioner had a duty to make provision for his wife's support. Under Colorado law the wife's rights during marriage do not vest in her an ownership of any part of the husband's property. Thus the liability of the husband for support of his wife is more in the nature of a personal obligation. The right of dower does not exist in Colorado, and a husband who has title to the property may convey it without the consent of the wife. It appears that the only inchoate right of any consequence the wife has in Colorado is, if she survives her husband, she may reject provisions he makes for her in his will and take instead one-half of his estate. In this instance the wife performed the usual duties of a housewife, and performed no other tasks to specifically assist in the accumulation of property, and brought no property into the marriage.

The divorce court acted under the Colorado statute which permitted it to make such provision for payment of alimony and maintenance of the wife "as may be reasonable," and to require security for its payment, or to enforce payment, "or may decree a division of property." 3 Colo. Rev. Stat. 1953 Ann. § 46-1-5. The divorce court recited the several factors it took into consideration, including the financial condition of the parties, the duty of the husband to support and maintain the wife, whether the wife brought any property into the marriage, the husband's earning capacity, and several other factors. As to the property, the divorce court then entered a decree that the parties each should have and retain as his or her sole and separate property all real and personal property the title to which was in his or her name at the time the action commenced. The decree also stated that it would act as a

conveyance of title from petitioner to his wife of an additional described parcel.

There was no property settlement agreement entered into by the petitioner and his wife. They had attempted to reach such an agreement but were unable to do so, and the divorce court made the allocation. The wife did not sign any release of alimony or of support. The Tax Court held that this case was controlled by United States v. Davis, 370 U.S. 65, 82 S.Ct. 1190, 8 L.Ed. 335, and found that the petitioner-appellant realized a long-term capital gain "as a result of the decree of divorce."

Petitioner argues that the Tax Court was in error in holding that a divorce decree in Colorado, which purported to transfer appreciated property to the wife, results in a capital gain to the husband in the absence of any voluntary agreement for a property settlement. Petitioner urges that the Tax Court was in error in holding that the case was governed by United States v. Davis, supra. He states that the case does not apply because the voluntary nature of the settlement or transfer was "the *sine qua non*" of Davis. The opinion does at several points mention the fact that the settlement there concerned was a voluntary one. In the case at bar, the transfer was instead accomplished by the court with no property settlement agreement entered into between the parties. The petitioner states that without such an agreement "the willing buyer and willing seller test of market value" could not be applied. He argues also that the court decree is not the "promise" or the "agreement" of Harris v. Commissioner, 340 U.S. 106, 71 S.Ct. 181, 95 L.Ed. 111. He further asserts that he has received no property at fair market value. Petitioner concedes there might be a basis for a claim that there was a sale in the event the court had

given the wife a money judgment and the petitioner had satisfied it by the transfer of property. But he urges there is no fixed indebtedness in the case at bar to be extinguished by a transfer of assets.

The fact that there is no property settlement agreement in the case before us does make it different in some respects from United States v. Davis, supra. This difference does not necessarily lead to a different result. The Supreme Court did mention at several places in its opinion that the parties had entered into a property settlement agreement, but there is nothing to show that this fact was given any particular weight. Petitioner's argument is that the absence of such an agreement makes impossible the determination of fair market value by the willing buyer and willing seller test. This argument is answered in United States v. Davis, supra, by the Court's application of another method of finding fair market value. The Court notes that the "amount realized" is defined as the money received plus the fair market value of the property (other than money) received. Int. Rev. Code of 1954, § 1001(b). In the Davis case, the Court of Claims and the Court of Appeals for the Sixth Circuit held there was no way to find the fair market value of the rights released by the wife, and thus no way to compute the gain. The Supreme Court said this conclusion was erroneous, and applied what it termed "an accepted practice." This practice was to hold, where property without readily ascertainable value is exchanged for other property in an arms' length transaction, that the values of the property on each side of the exchange are equal. The Court concedes that this may be a "rough approximation" but it is better than to ignore altogether the tax consequences of the transfer. This method is applicable here, and was correctly applied by

the Tax Court and the Commissioner. Our case of Champlin v. Commissioner, 71 F.2d 23 (10th Cir.), is stressed by petitioner. It concerned the valuation of shares of stock of a corporation, the property of which was in litigation. It is dissimilar to the case at bar, but to the extent that it is similar to United States v. Davis, supra, it must necessarily be modified thereby.

The argument was made in the Davis case that there was no arms' length transaction because of the emotional factors which accompany a divorce, but the Court rejected this argument. The petitioner's point that there can be no fair market value because there was no agreement is closely akin to such an argument, but here the parties to the divorce did not make the allocation, the court did at their request.

In the case at bar, the application of the assumption of equal value on exchange, discussed above, obviates the necessity for an attempt to value whatever inchoate rights the petitioner's wife may have lost by reason of the divorce court's allocation of property. The difficulties encountered in such a valuation, stated in Commissioner v. Marshman, 279 F.2d 27 (6th Cir.), are thereby avoided. The nature of these inchoate rights under Colorado law has been described, and in this respect the wife's interests are very similar to those in Delaware considered in United States v. Davis.

We do not characterize the transfer here as being either voluntary or involuntary in view of the fact that both parties to the divorce asked the court to make "a division." We hold that under the circumstances the result must be the same as if a property settlement had been reached by the husband and wife, as in United States v. Davis.

Another important fact in the case at bar which is different from the comparable fact in United States v. Davis, 370 U.S. 65, 82 S.Ct. 1190, 8 L.Ed. 2d 335, is that we here have no release of the wife's marital rights signed by her. Again in the Davis case the Court mentioned the express release by the wife, but did not indicate that its conclusion was based on such fact. The argument of the petitioner based on this difference is not dissimilar to his involuntary transfer or lack of agreement argument. Here again all matters relating to the rights and interests of the parties in property or personal obligations of the husband were covered by the decree or were implicit in the proceedings. It would of course be expected that an express release would be included in a property settlement agreement or at least a mention of such rights. Likewise, when the property allocation was submitted for the court's determination, its decree or the legal consequences of its action would cover and include the same matters. The divorce court's decree has completely disposed of the property issue, and the wife's marital rights relating to that subject have been terminated. The property was allocated and we are concerned here only with the value of such property transferred to the wife and to then apply the equal value theory. The divorce decree transferred property to the wife to satisfy whatever rights she was asserting or which were otherwise in issue. The parties asked the divorce court in effect to settle the property matter.

The transfer here concerned was a taxable event to support an imposition of the tax on the husband as held by the Tax Court and the Commissioner. Their method of valuation of that received by the husband was likewise correct.

Affirmed.